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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL LEON MATEEN, JR., Defendant and Appellant.	E069166 (Super.Ct.No. FSB1502785) OPINION

APPEAL from the Superior Court of San Bernardino County. William Jefferson Powell, IV, Judge. Affirmed.

Ronda Norris, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant, Daniel Leon Mateen Jr., appeals the judgment entered following jury convictions for aggravated sexual assault[1] (Pen. Code, § 269, subd. (a)(1);[2] count 1), and lewd acts upon a child (§ 288, subd. (a); counts 2, 3, & 4). The jury also found true that defendant had a prior conviction for committing lewd acts upon multiple victims as alleged in counts 2 through 4 within the meaning of section 667.61, subdivisions (a) and (d). In a separate proceeding, the jury found that defendant had suffered a prior strike conviction. The trial court sentenced defendant to 180 years to life in prison.

On appeal, defendant argues his conviction for count 4, the lewd act offense, must be reversed because there was insufficient evidence of that charge. Defendant also argues his sentence for count 1, the aggravated sexual assault conviction, should be stayed under section 654. We find no error and affirm the judgment.

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[1] Jane Doe 1 and Jane Doe 2 testified at defendant's trial. The charges pertain to Jane Doe 1.

[2] All statutory references are to the Penal Code.

II.

FACTS AND PROCEDURAL BACKGROUND

A. *The Prosecution's Case*

Defendant is Jane Doe 1's father. She has never lived with defendant. Jane Doe 1 has only visited with defendant. When Jane Doe 1 was nine years old, sometime between September 8, 2005, through July 14, 2006, defendant raped Jane Doe 1 during an overnight visit. About two months later, defendant sexually assaulted Jane Doe 1 on a second occasion when she was visiting him at defendant's grandmother's home.

B. *The First Sexual Assault/Rape (Jane Doe 1)*

In the summer, before Jane Doe 1 started fifth grade, she went to stay with defendant at his girlfriend, Sheila's apartment. Sheila had a five-year-old daughter, who was present at the apartment. While Sheila was at work, Jane Doe 1 and Sheila's daughter were sleeping in a bed together in Sheila's bedroom. Defendant awoke Jane Doe 1 and told her to go into another bedroom with him.

Jane Doe 1 went into the other bedroom as defendant instructed. Jane Doe 1 was wearing one of defendant's big shirts and panties. Jane Doe 1 was lying on her side watching cartoons when defendant began rubbing her "butt." As soon as defendant tried to pull down Jane Doe 1's panties, she told him to stop. Ignoring Jane Doe 1's protests, defendant told Jane Doe 1, "remember how I showed you to ride a motorcycle, this will be the same thing." Defendant then pulled down Jane Doe 1's panties, got on top of her

and put his penis inside her vagina. Jane Doe 1 screamed. Jane Doe 1 tried to push defendant on his chest to stop him from hurting her.

After forcibly raping Jane Doe 1, defendant took off her wet shirt. Jane Doe 1's vagina was burning her, so defendant put his mouth on it. After defendant orally copulated Jane Doe 1, he gave her back her panties but did not return her shirt. Jane Doe 1 cried and put her panties back on and left the bedroom. Jane Doe 1 did not tell anyone about defendant's sexual assault because she did not think anyone would believe her.

The next day, Jane Doe 1 was on the phone with her grandmother. Jane Doe 1 wanted to report defendant's abuse to her grandmother, but defendant walked in, so she did not say anything about the assault.

C. *The Second Sexual Assault/Sodomy (Jane Doe 1)*

Within two months of the first sexual assault, in 2006, Jane Doe 1's mother took her to defendant's grandmother's house so that defendant could babysit her. Jane Doe 1 was afraid of defendant and did not want to go. However, Jane Doe 1 was also afraid to tell her mother that defendant had raped her. Jane Doe 1 went over to defendant grandmother's house that day, but tried to avoid contact with defendant by playing with her cousins. Jane Doe 1's cousin, Jane Doe 2, who was five years old at the time, was also present at defendant's grandmother's home that day.

Jane Doe 1 fell asleep on the couch after playing with her cousins. Defendant then carried Jane Doe 1 from the couch into a bedroom. She awoke with her jeans pulled down and in pain when defendant had penetrated her "butt" with his penis. Jane Doe 1

told defendant to stop assaulting her, but he continued. After violating Jane Doe 1, defendant told her not to tell anyone about the assault. Jane Doe 1 then pulled up her jeans and went outside of the bedroom. Jane Doe 1 remained in the living room of defendant's grandmother's home, crying, while she awaited her mother's arrival that night.

D. *Defendant's Prior Molest Conviction (Jane Doe 2)*

Jane Doe 1's cousin, Jane Doe 2, was five years old when defendant sexually assaulted her at defendant's grandmother's home. When Jane Doe 2 awoke from a nap, defendant told her to go into another room. He then pulled down her pants, yanked out his penis, and rubbed it on top of her. During that incident, defendant also rubbed lotion on Jane Doe 2's inner thighs.

However, Jane Doe 2 did not immediately report the abuse. Jane Doe 2 eventually told her sister, Jane Doe 3, who called their mother and reported that Jane Doe 2 had been molested by defendant. Jane Doe 2's mother immediately called the police. During a forensic interview at the San Bernardino County children's assessment center, while a police officer was present and watched on a monitor, Jane Doe 2 stated her accusation that defendant had sexually abused her. Defendant pleaded guilty to molesting Jane Doe 2.

E. *Jane Doe 1's Report to Police in 2011*

In October 2011, Jane Doe 1's mother told her that she was going to take her to visit defendant. During their discussion, Jane Doe 1's mother gave her a letter from defendant that included his photograph. In the letter, defendant wrote that he loved Jane Doe 1. Defendant explained that he had pled guilty to molesting Jane Doe 2 in order to take a plea agreement and denied ever molesting Jane Doe 2.

Upon reading the letter, Jane Doe 1 became upset and ripped up defendant's letter. After Jane Doe 1 and her mother returned to their home, Jane Doe 1 told her mother that defendant had sexually assaulted her. Jane Doe 1's mother immediately called the police. The San Bernardino Police Department investigated. Both mother and Jane Doe 1 made statements about defendant to police officers. An investigating officer performed a warrants check and immediately discovered defendant was on parole for molesting Jane Doe 2.

Six weeks later, Jane Doe 1 discussed defendant's sexual assault with a detective from the San Bernardino Police Department. Jane Doe 1 did not report that defendant had sodomized her to either officer on either occasion.

At trial, Jane Doe 1 testified that she was embarrassed that defendant had touched her in a way that a father should not touch his daughter. Jane Doe 1 was nine years old at the time defendant sexually assaulted her. She did not immediately report defendant's abuse because she was frightened of defendant. Jane Doe 1 was also afraid that no one

would believe that defendant had sexually abused her so she kept the abuse a secret for years.

F. *The Defense Case*

Defendant did not testify at trial. When questioned by police, defendant denied that any sexual contact had occurred between defendant and Jane Doe 1. He explained to the police that Jane Doe 1's allegation about his penis may have been due to the fact that she had inadvertently viewed a picture of his penis on a cell phone.

Defendant's mother and Jane Doe 1's paternal grandmother, testified that Jane Doe 1 had visited her home in Mississippi when Jane Doe 1 was 10 years old. During a visit, and in front of Jane Doe 1's cousins, Jane Doe's grandmother questioned Jane Doe 1 about whether she had been molested by defendant. Jane Doe 1 denied that defendant had abused her.

G. *Procedural History*

Defendant was charged with aggravated sexual assault of a child in violation of section 269, subdivision (a)(1), and three counts of lewd acts on a minor, in violation of section 288, subdivision (a), as follows: count 2 pertained to an act during sexual intercourse; count 3 related to an act of oral copulation; and count 4 related to an act of sodomy. Counts 2 through 4 further alleged defendant had a prior conviction for lewd acts upon a child within the meaning of section 667.61, subdivisions (a) and (d).

During the trial, the parties stipulated that all four counts occurred between the dates of September 8, 2005, through July 14, 2006. The parties also stipulated that defendant had been incarcerated from July 14, 2006, through July 14, 2007.

A jury convicted defendant on all counts and found the enhancement allegations true. In a separate proceeding, the jury found that defendant had suffered a prior strike conviction. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) Defendant was sentenced to 180 years to life in prison as follows: Count 1 a 30-year-to-life term (a 15-year-to-life term was doubled due to the strike prior); counts 2 through 4 each 50-year-to-life consecutive terms (each a 25-year-to-life term was doubled due to a prior strike conviction). Defendant filed a timely notice of appeal.

III.

DISCUSSION

A. *Substantial Evidence to Support Count 4, the Sodomy Lewd Act*

Count 4 alleged Jane Doe 1 had been sodomized by defendant between the dates of September 8, 2005, through July 14, 2006, in violation of section 288, subdivision (a). Defendant contends there is insufficient evidence to prove count 4 beyond a reasonable doubt. He argues the evidence presented at trial regarding when the sodomy occurred with Jane Doe 1 is inherently improbable and cannot be reconciled with the jury's verdict. We conclude the jury's verdict is supported by substantial evidence that defendant assaulted Jane Doe 1 in 2006, prior to defendant's July 14, 2006, incarceration.

In evaluating a sufficiency of evidence, the proper test is "whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citation.]" (*Ibid.*)

However, """an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable."""" (*People v. Barnes* (1986) 42 Cal.3d 284, 306.) To warrant the rejection of testimony given by a witness at trial who has been believed by the trier of fact, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. Conflicts and even testimony which is subject to justifiable suspicion will not justify the reversal of a judgment because a trial judge or jury determines the credibility of a witness and the truth or falsity of the facts. (*Ibid*.)

Section 288, subdivision (a) provides, in relevant part: "Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious

act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." The statute is violated if there is "'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 452.) The offense described by section 288 subdivision (a) has two elements: """(a) the touching of an underage child's body (b) with a sexual intent."""" (*People v. Villagran* (2016) 5 Cal.App.5th 880, 890, quoting *U.S. v. Farmer* (9th Cir. 2010) 627 F.3d 416, 419.)

In *People v. Jones*, *supra*, 51 Cal.3d 294, our Supreme Court set out guidelines to determine the sufficiency of generic testimony about sexual abuse. "The victim, . . . must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct . . . ." (*Id*. at p. 316.) "[T]he victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information." (*Ibid*.) Additionally, "the victim must be able to describe *the general time period* in which these acts occurred" for example, "'the summer before my fourth grade' so as "to assure the acts were committed within the applicable limitation period." (*Ibid*.) Other "details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*Ibid*.)

Defendant contends that it is inherently improbable that Jane Doe 1 was sodomized during count 4's alleged time period because Jane Doe 1 testified that the second assault occurred in August *after* Jane Doe 1 had started fifth grade and while defendant was incarcerated. Defendant argues Jane Doe 1's testimony is improbable because she told no one about the sodomy incident.

We disagree that Jane Doe 1's testimony creates an impossible or inherently improbable factual circumstance that would require us to reject her testimony at trial and reverse defendant's conviction on count 4. Although we are charged with ensuring the evidence is reasonable, credible, and of solid value, it is the exclusive province of the trier of fact to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see also *People v. Snow* (2003) 30 Cal.4th 43, 66.)

The jury was instructed to consider whether defendant sodomized Jane Doe 1 between September 8, 2005, through July 14, 2006. Whether Jane Doe 1 told anyone about defendant's sodomy assault does not make Jane Doe 1's testimony at trial improbable. Jane Doe 1 testified that she was embarrassed and felt uncomfortable talking about her father's assaults. The jury was also instructed to not automatically reject Jane Doe 1's testimony because of any inconsistencies or conflicts.

As often occurs in cases of childhood abuse, Jane Doe 1 testified about defendant's abuse approximately nine years later. She was uncertain about the dates that defendant had sexually assaulted her. Although Jane Doe 1 testified that the sodomy

offense occurred in August, after she began fifth grade, the jury could have reasonably concluded Jane Doe 1 was mistaken about the month of the sodomy assault. Consistent with Jane Doe 1's first assault, she testified that she was afraid to go to her grandmother's home again. Jane Doe 1's mother also testified that Jane Doe 1 had approximately 30 visits with defendant and Jane Doe 1's visits with defendant likely ended in 2006.

Defendant nonetheless argues that because the parties stipulated that defendant was in custody from July 14, 2006, through July 14, 2007, the sodomy offense could not have been committed in August 2006. However, the jury could have reasonably rejected Jane Doe 1's testimony that the sodomy offense occurred in August. Jane Doe 1's testimony was neither impossible nor inherently improbable because she was certain that that defendant had committed the first sexual assault during the summer before she began fifth grade. Because Jane Doe 1 testified that the sodomy offense occurred about two months after defendant had raped her, the jury could have reasonably concluded that the second offense had to have occurred prior to when defendant was incarcerated on July 14, 2006.

The prosecutor argued that Jane Doe 1 was mistaken—that the sodomy incident occurred sometime after the first sexual assault because defendant "wasn't around in August." Jane Doe 1's testimony that she was first assaulted before she began fifth grade in school is supported by Jane Doe 2's testimony that defendant had sexually assaulted her at defendant's grandmother's home when she was five years old, and was around the same time period as defendant's assaults on Jane Doe 1. The jury also focused on

resolving the "chain of events" from September 2005 to July 2006. Thus, since defendant was incarcerated from July 14, 2006, the jury must have believed that Jane Doe 1's sodomy assault occurred before defendant's incarceration. Consequently, we reject defendant's contention that the evidence cannot be reconciled with the jury's verdict.

B. *Section 654*

Defendant also argues the trial court was required to stay count 1 under section 654. Defendant asserts that counts 1 and 2 refer to the same act of sexual intercourse and because a single act of vaginal penetration occurred in the first incident, he could not be sentenced for both counts.

Section 654, subdivision (a) provides, in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 protects against multiple punishment rather than multiple conviction. (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) Its purpose "'is to insure that the defendant's punishment will be commensurate with his criminal liability.' [Citation.]" (*People v. Norrell* (1996) 13 Cal.4th 1, 6, superseded in part by statute on another ground as stated in *People v. Kramer* (2002) 29 Cal.4th 720, 722.)

A defendant may not be punished for two separate crimes that arise either out of a single act or out of an indivisible transaction. (*People v. Ortega* (1998) 19 Cal.4th 686,

693; *People v. James* (1977) 19 Cal.3d 99, 119-120.) Whether a course of criminal conduct is divisible within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for one offense, but not for more than one. (*People v. Capistrano* (2014) 59 Cal.4th 830, 885.)

However, "[a] defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act." In those cases, the single intent and objective test of section 654 does not preclude punishment for each act. (*People v. Perez* (1979) 23 Cal.3d 545, 553.) Multiple sexual offenses committed on the same occasion are generally "'divisible'" from one another and may be punished separately consistent with section 654. (*People v. Scott* (1994) 9 Cal.4th 331, 344, fn. 6; *People v. Harrison* (1989) 48 Cal.3d 321, 334-338.)

Section 654 does not bar multiple punishment where temporal separation of offenses affords a defendant an opportunity to reflect and to renew his or her intent before committing the next offense. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) Rather, section 654 precludes multiple punishments for a single act or indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294.)

Here, in punishing defendant separately for each count, the trial court specifically found that counts 1 and 2 were for nonidentical crimes. A trial court's explicit or implied finding that a defendant harbored a separate intent and objective for each offense will be

upheld on appeal if it is supported by substantial evidence. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1368, disapproved on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Count 1 alleged that defendant had committed the crime of aggravated assault by raping Jane Doe 1. Count 2 alleged defendant committed lewd acts on Jane Doe 1 to gratify his lust. Although the information included a parenthetical reference to sexual intercourse, at trial, the jury was told that defendant's act of rubbing Jane Doe 1 on the buttocks, not the intercourse, was the basis of defendant's lewd act crime as charged in count 2. Additionally, the verdict form says nothing about sexual intercourse. Instead, the People emphasized that the rubbing of the buttocks was a separate and divisible act from the forcible rape that occurred and thus may be separately punished.

Accordingly, substantial evidence supports the trial court's determination to punish defendant separately since the two convictions were not based on defendant's identical conduct and are supported by the record. We therefore conclude that the trial court was not required to stay punishment for count 1 under section 654.

IV.

DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.